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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/827,834	04/06/2001	Jeffrey John Kester	8043M	6353

27752 7590 08/27/2002

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EXAMINER

BAHAR, MOJDEH

ART UNIT PAPER NUMBER

1617

DATE MAILED: 08/27/2002

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Please find below and/or attached an Office communication concerning this application or proceeding.

**Office Action Summary**

Application No.

09/827,834

Applicant(s)

KESTER ET AL.

Examiner

Mojdeh Bahar

Art Unit

1617

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

**Period for Reply**

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

**Status**

- 1) ☒ Responsive to communication(s) filed on June 4, 2002.
- 2a) ☒ This action is **FINAL**.                      2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

**Disposition of Claims**

- 4) ☒ Claim(s) 1-28 is/are pending in the application.
- 4a) Of the above claim(s) 17-22, 23 (in part), 24-26 is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-16, 23 (in part), 27-28 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

**Application Papers**

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
- Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
- 11) ☐ The proposed drawing correction filed on \_\_\_\_\_ is: a) ☐ approved b) ☐ disapproved by the Examiner.
- If approved, corrected drawings are required in reply to this Office action.
- 12) ☐ The oath or declaration is objected to by the Examiner.

**Priority under 35 U.S.C. §§ 119 and 120**

- 13) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All   b) ☐ Some \* c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- \* See the attached detailed Office action for a list of the certified copies not received.
- 14) ☒ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. § 119(e) (to a provisional application).
- a) ☐ The translation of the foreign language provisional application has been received.
- 15) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. §§ 120 and/or 121.

**Attachment(s)**

- 1) ☐ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☐ Information Disclosure Statement(s) (PTO-1449) Paper No(s) \_\_\_\_\_
- 4) ☐ Interview Summary (PTO-413) Paper No(s). \_\_\_\_\_
- 5) ☐ Notice of Informal Patent Application (PTO-152)
- 6) ☐ Other:

### DETAILED ACTION

Applicant's response to the first office action of March 12, 2002, submitted June 4, 2002 is acknowledged. Note that although the file wrapper indicates that applicant has filed an IDS on May 10, 2002, neither the 1449 form, nor the references themselves could be located and thus could not be considered.

Claims 1-16, 23 (in part) and 27-28 are herein examined on the merits in so far as they read on the elected invention.

This application contains claims 17-22, 23 (in part), and 24-26, drawn to an invention nonelected with traverse in Paper No. 6. A complete reply to the final rejection must include cancelation of nonelected claims or other appropriate action (37 CFR 1.144) See MPEP § 821.01.

### *Claim Rejections - 35 USC § 103*

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

The factual inquiries set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

1. Determining the scope and contents of the prior art.
2. Ascertaining the differences between the prior art and the claims at issue.
3. Resolving the level of ordinary skill in the pertinent art.

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4. Considering objective evidence present in the application indicating obviousness or nonobviousness.

Claims 1-16, 23 (in part) and 27-28 are rejected under 35 U.S.C. 103(a) as being unpatentable over Jandacek (USPN 4,005,195) Akoh and FDA announcement abstract.

Jandacek (USPN 4,005,195) teaches food compositions comprising polyol fatty acid polyesters, see abstract, col.6, lines 30-33, example IV, and col. 9, lines 4-24. Jandacek (USPN 4,005,195) further teaches that its compositions are useful in treating hypercholesterolemia, see abstract, col. 3, lines 28-31.

Akoh teaches that Oatrim, an Oat-based product containing 5% beta-glucan is among fat replacers in food and can help the adherence to a low fat diet and lowering cholesterol, see abstract, page 47 and page 52 in particular. Akoh further teaches that Oatrim can be used in confectionary, desserts and baked goods, see col. 2, page 52.

FDA announcement abstract teaches that Beta Glucon soluble fiber in oats (whole, bran, rolled, flour) can lower blood cholesterol levels, see abstract.

Jandacek, Akoh and FDA announcement abstract taken together, do not teach the combination of beta glucan and polyol fatty acid esters in a food composition and their particular amounts.

It would have been obvious to one of ordinary skill in the art at the time the invention was made to employ beta glucan and polyol fatty acid esters in a food composition. It would have also been obvious to employ beta glucan and polyol fatty acid esters in the amounts claimed herein.

One of ordinary skill in the art would have been motivated to employ beta glucan and polyol fatty acid esters in a food composition because they are both known to have

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antihypercholesterolemic effects. Combining two agents which are known to be useful to have antihypercholesterolemic effects individually into a single composition useful for the very same purpose is *prima facie* obvious. See *In re Kerkhoven* 205 USPQ 1069. Optimization of amounts is within the purview of the skilled artisan and is therefore obvious.

### ***Response to Arguments***

Applicant's arguments filed June 4, 2002 have been fully considered but they are not persuasive. Applicant first argues that a *prima facie* case of obviousness has not been established because the particular amounts and ratios herein are not taught or suggested by the prior art. It is well established patent law that the optimization of amounts/ratios is within the purview of the Skilled Artisan and is therefore obvious.

In response to applicant's argument that although the beta-glucan is used *primarily* because of its hypocholesterolytic effect, the digestible fat is used *primarily* for the benefit of providing an appealing taste and texture, the fact that applicant has recognized another advantage which would flow naturally from following the suggestion of the prior art cannot be the basis for patentability when the differences would otherwise be obvious. See *Ex parte Obiaya*, 227 USPQ 58, 60 (Bd. Pat. App. & Inter. 1985).

Applicant finally argues that the instant invention provides a solution to a long-felt need in the art. Note that **objective evidence** that an art recognized problem existed in the art for a long period of time without solution must first be established, see MPEP 716.04. No such **objective evidence** has been put forth. Note that attorney's argument do not take the place of objective evidence.

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**THIS ACTION IS MADE FINAL.** Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire **THREE MONTHS** from the mailing date of this action. In the event a first reply is filed within **TWO MONTHS** of the mailing date of this final action and the advisory action is not mailed until after the end of the **THREE-MONTH** shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than **SIX MONTHS** from the mailing date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Mojdeh Bahar whose telephone number is (703) 305-1007. The examiner can normally be reached on (703) 305-1007 on Monday, Tuesday, Thursday and Friday from 8:30 a.m. to 6:30 p.m.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Minna Moezie, J.D., can be reached on (703) 308-4612. The fax phone number for the organization where this application or proceeding is assigned is (703) 308-4556.

Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to the receptionist whose telephone number is (703) 308-1235.

Mojdeh Bahar  
Patent Examiner  
August 22, 2002

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GROUP 1